No. 50160-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM CANNING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Gary Bashor, Judge
The Honorable Michael H. Evans, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove Mr. Canning possessed methamphetamine with intent to deliver.

2. The court erred by ordering Mr. Canning to pay a $250 discretionary legal financial obligation absent a finding he had the ability or likely future ability to pay it.

3. The judgment and sentence incorrectly lists an offender score of 5 rather than the score of 3 as found by the trial court.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Canning's conviction for possession with intent to deliver methamphetamine should be dismissed because no evidence supported an intent to deliver the 14 grams of methamphetamine he had in his possession for personal use?

2. A court may not order a person to pay discretionary legal financial obligations (LFOs) absent individualized inquiry into his ability to do so. Did the court err by ordering Mr. Canning to pay a discretionary $250 jury demand fee without the required individualized inquiry or finding of ability to pay?

3. Whether Mr. Canning's case should be remanded to the trial court to correct the scrivener's error in the judgment and sentence that

lists an offender score of 5 rather than the offender score of 3 found by the court?

C. STATEMENT OF THE CASE

1. Procedural Facts

The state charged Mr. Canning with possession with intent to deliver methamphetamine and possession of heroin. CP 1-2.

Mr. Canning moved to suppress the methamphetamine and heroin evidence. CP 10-15; RP1[1] 12-49. He argued the police failed to provide him required *Ferrier* warnings[2] prior to searching his truck for his wallet and identification. CP 16-17. The court heard and denied the suppression motion finding case law did not support the requirement of *Ferrier* warnings prior to a vehicle search based on consent. RP1 12-49.

A jury subsequently found Mr. Canning guilty as charged. CP 18, 20.

The court found Mr. Canning had an offender score of 3 and sentenced him to 20 months in DOC plus 12 months of community supervision. RP2 241, 246; CP 25-26. The judgment and sentence mistakenly notes the court found an offender score of 5. CP 23.

[1] There are 2 volumes of verbatim report of proceedings, RP1 and RP2.
[2] *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

At sentencing, there was no discussion of Mr. Canning's ability to pay discretionary legal financial obligations (LFOs). RP2 235-47. The court simply noted it was "imposing financial obligations as required by statute." RP2 246. The court imposed mandatory LFOs and one discretionary LFO, the $250 jury demand fee. CP 27.

Mr. Canning now appeals all portions of his judgment and sentence. CP 33.

2. Trial Testimony and Evidence

Mr. Canning drove a truck registered to Michael Moody into the Longview 15th Avenue Safeway parking lot. Members of the Longview Police Street Crimes Unit were in the parking lot checking vehicle registrations. The registration check lead the police to discover that Moody's driver's license was suspended and there was a warrant for his arrest. RP1 110-11. Because the police could not distinguish Mr. Canning from Mr. Moody, they asked Mr. Canning for identification. After the police confirmed Mr. Canning's identify, they arrested him. RP1 113.

The police searched Mr. Canning incident to arrest. RP1 113. They found a plastic container in his pants pocket. RP1 114, 182. There were four plastic baggies inside the container RP1 115. One baggy contained a brown tar-like substance that tested positive as heroin. RP1 115, 148-58.

The three other baggies contained methamphetamine. RP1 115-16, 156-58. Those bags weighed 5.2 grams, 6.8 grams, and 1.0 grams. RP1 156.

Mr. Canning only had $125 on his person. RP1 144. He made the money cutting wood. RP1 185.

Mr. Canning had no drug packaging material, no scales, and no ledgers of ostensible drug buys or sales. RP1 102, 144-45. If he had a cell phone, the detectives never attempted to obtain a search warrant to look for any drug dealing narrative via texts or the like. RP1 102, 144. The police did not testify to hearing Mr. Canning engage in drug sales talk. RP1 102-45. No one testified to having purchased methamphetamine from Mr. Canning. RP1 102-45. No one testified Mr. Canning had a weapon. RP1 102-45. No one testified they had seen Mr. Canning deal methamphetamine.

Mr. Canning was a methamphetamine addict who could consume 14 grams of methamphetamine in seven to ten days. RP1 183-84.

Mr. Canning purchased his methamphetamine from a person he did not know or did not want to name. RP1 186. He paid around $200 for the 14 grams. RP1 187. What he requested from the seller was a half-ounce. RP1 187. The seller gave him the requested amount in the 3 baggies seized by the police. RP1 187. He had consumed some of it before the police seized it. RP1 188.

Detective Mortenson confirmed a person could buy 14 grams of methamphetamine in bulk in Cowlitz County for $150-$200. RP1 143-44.

Had Mr. Canning supported his addiction by buying .1 gram of methamphetamine for $10 a pop, as some users commonly did, in two weeks he would have paid $1400 for the same methamphetamine he could buy in bulk for $200. RP1 108-09, 118, 133. No one testified to methamphetamine going bad or spoiling from non-use. RP1 102-45, 175-91.

The heroin belonged to a friend who had inadvertently left it at Mr. Canning's house. RP1 183. Mr. Canning left his house after a fight with his girlfriend. RP1 188. Mr. Canning took the heroin with him to ensure that it would be safeguarded for his friend. RP1 188-89. Mr. Canning knew heroin addicts got sick when they go without heroin. RP1 190.

Street Crimes Sergeant Langlois and Detective Mortenson testified that they start thinking of drug dealers when a person possesses 3–3.5 grams or more of methamphetamine regardless of the absence of any other indicia of dealing such as packaging, scales, a weapon, or any records of drug transactions. RP1 109, 118-20, 129, 142-45.

The state presented no rebuttal testimony that Mr. Canning's consumption of 14 grams of methamphetamine in seven to ten days was

an out of the ordinary use of methamphetamine by a methamphetamine addict. RP1 183-84, 191.

D. ARGUMENT

Issue 1. The possession with intent to deliver conviction is not supported by the evidence and should be dismissed.

The state's evidence fails. No evidence suggests Mr. Canning possessed the methamphetamine with intent to deliver it. Rather, the amount possessed by Mr. Canning supported nothing more than the possession of a user quantity by a methamphetamine addict who could afford to buy in bulk. Mr. Canning's conviction should be reversed and the charge dismissed.

Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the state, it would permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficiency claim admits the truth of the state's evidence and requires that all reasonable inferences be drawn in the state's favor and interpreted most strongly against the defendant. *Id*. Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The elements of possession of a controlled substance with intent to deliver are (1) unlawful possession (2) with intent to deliver (3) a controlled substance. RCW 69.50.401(1).

Washington case law forbids the inference of intent to deliver based on mere possession of a controlled substance without more. *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). The *Brown* court cautioned against the use of opinion testimony to inflate a "naked possession" case into one with stiffer penalties:

> The courts must be careful to preserve the distinction and not to turn every possession of a minimal amount of a controlled substance into a possession with intent to deliver without substantial evidence as to the possessor's intent above and beyond the possession itself.
>
> Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession.

Id. at 485.

In *Brown*, the state charged the defendant with possession with intent to deliver cocaine. *Id*. at 485. Although the officer saw neither Brown nor the other boy he was with do anything to indicate a drug sale, the officer testified that he had extensive experience in narcotics enforcement and that the approximately 20 rocks of crack he recovered from Brown was "'definitely in excess of the amount commonly possessed

for personal use only.'" *Id*. at 484-85. The officer said, "'this is an exceedingly large amount to be possessed for personal use only. And this is definitely possessed with the intent to deliver.'" *Id.* at 482. The court held an officer's opinion about what a person would carry for normal use to be insufficient as corroborating evidence. *Id*. at 485.

"Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession." *Brown*, 68 Wn. App. at 485.

Examples of evidence of the "at least one additional factor" for an inference of intent to deliver are found in case law. *State v. Hagler*, 74 Wn. App. 232, 236, 872 P.2d 85 (1994) (large amount of cocaine broken into individual sale-size "rocks" and $342 cash in denominations consistence with proceeds of prior sales sufficient to establish intent to deliver); *State v. Lane*, 56 Wn. App. 286, 297-98, 786 P.2d 277 (1989) (one ounce of cocaine, $850 cash hidden in a diaper bag, and scales sufficient to establish intent to deliver); *State v. O'Connor*, 155 Wn. App. 282, 290–91, 229 P.3d 880 (2010) (131 marijuana plants in various stages of production, six and a half pounds of drying harvested marijuana, and a triple beam scale sufficient to establish possession with intent to deliver); *State v. Mejia*, 111 Wn.2d 892, 766 P.2d 454 (1989) (presence of 1½ pounds of cocaine

combined with informant's tip and controlled buy supported intent to deliver inference); *State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992) (possession of cocaine coupled with officer's observations of deals supported inference of intent); *Lane*, 56 Wn. App. 286 (1 ounce of cocaine, together with large amounts of cash and scales, supported an intent to deliver); *State v. Simpson*, 22 Wn. App. 572, 590 P.2d 1276 (1979) (possession of uncut heroin, lactose for cutting and balloons for packaging supported an intent to deliver).

By contrast, Mr. Canning was merely in possession of the 14 grams of methamphetamine he needed to support his methamphetamine addiction for 7 to 10 days. RP1 184. The police detectives, both trained and experienced in matters of drug use and drug sale investigations in Cowlitz County, did not rebut Mr. Canning's testimony about personal use. RP1 191. Volume alone was the only indicia of intent to deliver. And as the case law makes clear, volume alone is not enough.

At just $200 for 7-10 days' use, it made sense for Mr. Canning to buy in bulk. The detectives testified that methamphetamine sellers sell, and users purchase, methamphetamine by the point, or .1 grams. commonly for $10. RP1 108-09. Buying in bulk was a significant savings over the $1,400 a person would spend for 14 grams if they purchased it by

the common .1 gram, $10 "point." RP1 108-09, 107-09, 117-18, 133, 143-44, 187. Even if Mr. Canning had not consumed his methamphetamine in 7-10 days, no evidence suggested methamphetamine spoils or reaches an expiration date.

Like *Brown*, this is a naked possession case. The evidence of possession with intent to deliver is not sufficient. Mr. Canning had no weapon, no substantial sum of money, no scales, no individual packaging, no ledgers of sales, or other drug paraphernalia indicative of sales or delivery. The officers observed no actions suggesting sales or delivery or even any conversations which could be interpreted as constituting solicitation. "Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession." *Brown*, 68 Wn. App. at 485.

Because the evidence of possession with intent was insufficient, reversal is required. Reversal for insufficient evidence is "equivalent to an acquittal" and bars retrial for the same offense. *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009). "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 57

L.Ed.2d 1 (1978); *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016), *review dismissed*, 187 Wn. 2d 1021, 390 P.3d 333 (2017).

Issue 2. The court should not have ordered Mr. Canning to pay any discretionary legal financial obligations.

The legislature has mandated that a court "'shall not order a defendant to pay costs unless the defendant is or will be able to pay them.'" *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (quoting RCW 10.01.160(3)).

This imperative language prohibits a trial court from ordering discretionary LFOs absent an individualized inquiry into the person's ability to pay. *Id*. The *Blazina* court suggested that an indigent person likely could never pay LFOs. *Id*. ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

In his oral ruling, the sentencing judge indicated that he would impose only mandatory LFOs. RP2 246. The court did not inquire into Mr. Canning's financial situation, and made no finding regarding his ability to pay. RP2 235-47; CP 25. The court should have ordered no discretionary LFOs.

However, instead of ordering only mandatory LFOs, the sentencing court ordered Mr. Canning to pay a $250 jury demand fee. CP 27. By statute, the jury demand fee "*may* be imposed as costs under RCW 10.46.190." (Emphasis added.) RCW 36.18.016(3)(b). This is a discretionary cost. See, e.g., *State v. Lundy*, 176 Wn. App. 96, 107, 308 P.3d 755 (2013) (describing jury demand fee as discretionary); RCW 10.01.160(2). The $250 jury demand fee must be stricken. *Blazina*, 182 Wn.2d at 838.

Issue 3. The court should remand for correction of a scrivener's error in the judgment and sentence.

Scrivener's errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its initiative or on the motion of any party. The remedy for a scrivener's error in a judgment and sentence is remand to the trial court for correction. CrR 7.8(a); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010).

Mr. Canning's judgment and sentence contains a scrivener's error in the offender score calculation. CP 25. The court found Mr. Canning's

offender score was 3 points yet the judgment and sentence lists the offender score as 5 points. RP2 241; CP 25.

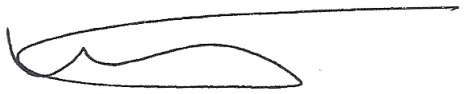
Mr. Canning's case should be remanded to the trial court for correction.

E. CONCLUSION

Mr. Canning conviction for possession with intent to deliver methamphetamine should be reversed for insufficient evidence.

Alternatively, the case should be remanded to strike the discretionary jury demand fee and correct the offender score on the judgment and sentence from 5 points to 3 points per the trial court's ruling.

Respectfully submitted January 9, 2018.



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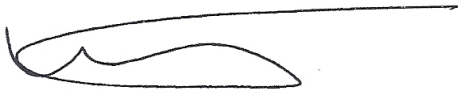
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Cowlitz County Prosecutor's Office, at appeals@co.cowlitz.wa.us; (2) the Court of Appeals, Division II; (3) Sean Brittain at brittains@co.cowlitz.wa.us, and (4) I mailed it to William Canning/Longview Work Release, 1821 1st Ave., Longview, WA 98632.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 9, 2018, in Winthrop, Washington.



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